Azizi bin Amran v Hizzam bin Che Hassan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–04–72 OF 2003
GOPAL SRI RAM, MOHD GHAZALI AND ZULKEFLI JJCA
24 APRIL 2006

Damages (Personal Injury or Death) — Personal injuries — Loss of earning capacity — Plaintiff would later develop osteoarthritis — Whether subsequent aggravation of present injury in the future must be considered to determine loss of earning capacity

Damages (Personal Injury or Death) — Personal injuries — Pain and suffering — Whether damages awarded manifestly low

Damages (Personal Injury or Death) — Quantum — Leg — Shortening — Whether damages awarded manifestly low

Tort — Damages — Personal injuries — Egg skull rule — Whether court must consider previous disabilities of plaintiff in awarding damages for present injury — Egg skull rule applied — Reasonable deduction made for previous injuries

The defendant had been found totally liable at the sessions court for an accident involving the plaintiff. As a result of the accident, the plaintiff suffered: (1) a 4cm shortening of the left leg and walked with a limping gait; (2) there was a wasting of the muscle of his left leg with associated weakness; and (3) there was marked stiffness of his left knee. There was medical evidence that the plaintiff would later develop osteoarthritis of the joint in which he would have to endure more pain and stiffness. The plaintiff had already made a claim for a previous 2cm shortening in an earlier civil suit.

On appeal, the High Court affirmed the award of damages made by the sessions court and dismissed the plaintiff's appeal. The learned High Court judge also did not allow the plaintiff's claim for loss of earning capacity as he was of the view that for all the disabilities the plaintiff had already been compensated for pain and suffering under the award of general damages. The plaintiff appealed to the Court of Appeal arguing that: (1) the award for pain and suffering amounting to RM28,000 was manifestly low; and (2) there should have been an award for loss of earning capacity. The issue was whether the court should have considered an award based on 2.5cm or on 4.0cm shortening of the left leg.

Held, allowing plaintiff's appeal:

(1) The award should be on the basis of 4.0cm shortening with a slight scaling

down for compensation the plaintiff received in the first accident. In this regard, the defendant must take his victim as he finds him. This is the egg-shell skull rule (see para 9).

(2) The sessions court judge erred in not taking into consideration the effect of the present overall disability of 4cm suffered by the plaintiff. Prior to this accident the plaintiff had a shortening of 1.5 to 2.0cm. However this did not disable him for he kept working. The plaintiff only received crippling disabilities in the present accident. The learned judge of the High Court was therefore wrong when he refused to take the present disabilities including the previous injuries into consideration in deciding whether to enhance the award made by the learned trial sessions court judge (see para 12).

(3) The award of RM28,000 for pain and suffering in the circumstances of this case was not only manifestly low but way of the mark and out of the trend with comparable injuries (see para 13).

(4) For the present injuries and disabilities, the plaintiff should be entitled to an award of RM45,000. However, the court would make a slight reasonable deduction of RM10,000 for the previous injuries sustained by the plaintiff. Therefore, the award for pain and suffering to the plaintiff in this case was increased from RM28,000 to RM35,000 (see para 22).

(5) The plaintiff was also to be compensated for the disabilities which would affect his earning capacity when osteoarthritis set in and his pain and stiffness of the knee increased. Had the learned judge kept specially the deadly osteoarthritis in mind he would have considered making the award for loss of earning capacity which the learned trial sessions court judge clearly failed (see para 26).

(6) If the plaintiff losses his present employment it would be difficult for him with the onset of osteoarthritis to get a similar job or a job with the same salary and this is not a fanciful risk. The learned judge had erred in his failure to consider this point (see para 27).

(7) Based on the injuries sustained by the plaintiff, this was a fit and proper case for loss of earning capacity to be awarded to the plaintiff. An award of a sum of RM15,000 to the plaintiff was a being fair and reasonable having regard to the nature of the plaintiff's work, the age of the plaintiff at the time of the accident and the likelihood that it would be difficult for him to get a similar job or a job with the same salary at some time before the estimated end of his working life (see para 29).

[Bahasa Malaysia summary

Defendan didapati bertanggungjawab keseluruhannya di mahkamah sesyen kerana satu kemalangan yang melibatkan plaintif. Akibat kemalangan itu, plaintif mengalami: (1) pemendekan kaki kiri sebanyak 4sm dan berjalan tempang; (2) penyusutan otot kaki kirinya yang lemah; dan (3) terdapat ketegangan di lutut kiri. Terdapat keterangan perubatan bahawa plaintif akan mengalami osteoartritis di bahagian sendi yang mengakibatkan kesakitan dan ketegangan yang ketara. Plaintif telahpun membuat tuntutan untuk pemendekan 2sm sebelumnya dalam satu guaman sivil terdahulu.

Dalam rayuan, Mahkamah Tinggi telah mengesahkan award ganti rugi yang dibuat oleh mahkamah sesyen dan menolak rayuan plaintif. Hakim Mahkamah Tinggi juga tidak membenarkan tuntutan plaintif untuk kehilangan kapasiti memperoleh pendapatan kerana beliau berpendapat bahawa kesemua kehilangan upaya plaintif telahpun diberi pampasan untuk kesakitan dan kesengsaraan di bawah award ganti rugi am. Plaintif telah merayu ke Mahkamah Rayuan dengan berhujah bahawa: (1) award untuk kesakitan dan kesengsaraan berjumlah RM28,000 amat rendah; dan (2) sepatutnya terdapat award untuk kehilangan kapasiti mencari pendapatan. Persoalannya adalah sama ada mahkamah patut mempertimbangkan satu award berdasarkan pemendekan kaki kiri sebanyak 2.5sm atau 4.0sm.

Diputuskan, membenarkan rayuan plaintif:

(1) Award tersebut patut berdasarkan pemendekan 4.0sm dengan penurunan skala untuk pampasan yang plaintif telah terima dalam kemalangan pertama. Oleh itu, defendan hendaklah menganggap mangsanya seperti yang ditemuinya. Ini adalah rukun 'egg-shell skull' (lihat perenggan 9).

(2) Hakim mahkamah sesyen terkhilaf kerana tidak mengambilkira kesan keseluruhan kehilangan upaya sedia ada 4sm yang dialami oleh plaintif. Sebelum kemalangan ini plaintif telahpun mengalami pemendekan 1.5 hingga 2sm. Bagaimanapun ini tidak menghilangkan upayanya untuk bekerja. Plaintif hanya mengalami kehilangan upaya yang melumpuhkan dalam kemalangan ini. Hakim Mahkamah Tinggi yang bijaksana dengan itu telah terkhilaf apabila enggan menganggap kehilangan upaya semasa termasuklah kecederaan sebelumnya dalam pertimbangan untuk memutuskan sama ada untuk menambahkan award yang dibuat oleh hakim perbicaraan mahkamah sesyen yang bijaksana (lihat perenggan 12).

(3) Award RM28,000 untuk kesakitan dan kesengsaraan dalam keadaan kes ini bukan hanya amat rendah tetapi di bawah paras dan tidak mengikut trend semasa untuk kecederaan yang sama (lihat perenggan 13).

(4) Untuk kecederaan dan kehilangan upaya semasa, plaintif patut berhak mendapat award RM45,000. Namun, mahkamah akan membuat pemotongan RM10,000 untuk kecederaan sebelumnya yang dialami oleh plaintif. Oleh itu, award untuk kesakitan dan kesengsaraan untuk plaintif dalam kes ini dinaikkan daripada RM28,000 kepada RM35,000 (lihat perenggan 22).

(5) Plaintif juga diberikan pampasan untuk kehilangan upaya yang akan menjejaskan kapasiti mencari pendapatan apabila mula mengalami osteoartritis dan kesakitan dan ketegangan lutut bertambah. Jika hakim yang bijaksana mengambilkira osteoartritis yang akan mendatang beliau akan menimbangkan untuk memberikan satu award untuk kehilangan kapasiti mencari pendapatan yang mana hakim perbicaraan mahkamah sesyen nyata gagal untuk berbuat sedemikian (lihat perenggan 26).

(6) Jika plaintif kehilangan pekerjaan semasanya ia akan menyukarkannya dengan mulanya serangan osteoartritis untuk mendapat pekerjaan yang sama atau satu pekerjaan dengan gaji yang sama dan ini bukan satu risiko yang merupakan

khayalan. Hakim yang bijaksana telah terkhilaf kerana gagal untuk mempertimbangkan perkara ini (lihat perenggan 27).

(7) Berdasarkan kecederaan yang dialami oleh plaintif, ini merupakan satu kes yang sesuai untuk kehilangan kapasiti mencari pendapatan yang patut diawardkan kepada plaintif. Satu award berjumlah RM15,000 kepada plaintif adalah adil dan munasababh dengan mengambilkira sifat pekerjaan plaintif, umur plaintif pada masa kemalangan berlaku dan kebarangkalian ia akan menyukarkannya untuk mendapat pekerjaan yang sama atau satu pekerjaan dengan gaji yang sama pada suatu masa sebelum anggaran tempoh hayat pekerjaannya tamat (lihat perenggan 29).]

Notes

For cases on leg, quantum of damages for injury to, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1183–1185.

For cases on loss of earning capacity, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 680–691.

For cases on pain and suffering, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 765–769.

For cases on personal injury, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 212–213.

Cases referred to

Azman bin Kasri v Md Isa bin Endut & Govt of Malaysia [1988] 2 CLJ 743 (refd)

Balakrishnan s/o Kuniamboo Nair v Savastine Anthony s/o Francis [1991] 1 CLJ 503 (refd)

Hughes v Lord Advocate [1963] AC 837 (HL) (refd)

Juminah bt Tongkon & Anor v Yim Kam Cheng & Anor [1991] Mallal's Digest para 990 (refd)

Krishnan & Anor v Chow Wing Khuan [1987] 2 MLJ 691 (refd)

Leong Yee Hoong v Amuthamulan a/p Shanmugam & Anor [2003] 3 MLJ xii (refd)

Mazlan bin Abu Bakar v Hob Kai Cheong [1999] Mallal's Digest para 1225 (refd)

Mustapha bin Kassim & Anor v Md Akhir bin Ariffin [2003] 3 MLJ x (refd)

Othman bin Ahmad v Singapore Tractor Co Ltd [1966] 1 MLJ 64 (refd)

Saravanam a/l M Ramasamy v Muniyandi [2003] 3 MLJ iv (refd)

Watts v Rake [1960] 108 CLR 158 (refd)

Yee Yat Wah lwn Hoo Wong @ Hob See Wong dan satu lagi dan Shim Chin Tong (pihak ketiga) [1994] CLJ 414 (refd)

Appeal from: Civil Appeal No 12–76 of 1999 (High Court, Pulau Pinang)

Brijnandan Singh Bhar (Shailender Bhar with him) (Brijnandan Singh Bhar & Co) for the appellant.

J Theeba Jothi (Kumar & Co) for the respondent.

Zulkefli JCA (delivering judgment of the court):

[1] This is an appeal by the plaintiff against the decision of the learned judge of the High Court at Penang who on an appeal by the plaintiff in respect of quantum only had affirmed the award of damages made by the learned judge of the sessions court and dismissed the plaintiffs appeal. At the sessions court, the defendant had been found totally liable for the accident.

[2] Mr Brijnandan Singh Bhar, learned counsel for the plaintiff before the High Court on appeal and again before us had argued on two main grounds as follows:

(a) that the award for pain and suffering amounting to RM28,000 was manifestly low; and

(b) that there should have been an award for loss of earning capacity.

PAIN AND SUFFERING

[3] In the first medical report produced for the plaintiff, it is stated that as of the date of accident that is 7 April 1996, the plaintiff was in hospital for 18 days. The injuries were as follows:

(1) Closed supracondylar fracture of left femur with comminution;

(2) Closed fracture mid-shaft of left tibia;

(3) Old fracture of upper 1/3 left tibia.

Management:

(1) Plating of left femur with bone grafting done under spinal anaesthesia after 16 days of admission to hospital;

(2) Fracture of left tibia was mangled conservatively.

[4] The plaintiff also produced the medical report of the orthopaedic specialist who examined the plaintiff on 18 July 1997 and the findings of the specialist were:

(1) Although walked with a limping gait, able to walk unaided;

(2) Left leg was 4cm shorter than the right;

(3) Thigh girths when measured 10cm from the upper poles of the knee caps showed the right to be 43cm and the left 40 ½ cm indicating wasting of the muscles of the left leg;

(4) Scars:

(a) 23cm long scar over the] lateral aspect of the left lower thigh;

(b) 7cm bone graft donor scan over the anterior aspect of the right iliac crest.

(5) Swelling around the knee joint with bow legged deformity of 10° of the knee joint with a range of movements of flexion being 0°–80° (Normal: 0°–150°);

(6) Whilst he was able to stand on one leg he was unable to squat;

(7) The fracture of the femur has united with angulations and the shortening. There is a plate and screws across the fracture site;

(8) The cost of removal of the plate and screws with hospitalization will be RM3,000;

(9) Inevitable that he would gradually develop osteoarthritis of the knee joint.

[5] Subsequent to the above earlier report, the same orthopaedic specialist gave another report about a year later wherein he confirmed that about 1.5 to 2cm of the shortening was due to the old fracture. The said orthopedic specialist opinioned that the accident in question had left the plaintiff with a shortening of 2 to 2.5cm.

[6] At the trial before the sessions court, the learned sessions court judge made the award of damage for pain and suffering as follows:

(1)	closed supracondylar fracture of the left femur with comminution	)
(2)	closed fracture of the mid shaft of the left tibia with 4cm shortening	) RM25,000
(3)	23cm scar over the lateral aspect of the left lower thigh	) RM3,000
		RM28,000

[7] In the sessions court, learned counsel for the plaintiff submitted for an award of RM50,000 for pain and suffering without citing any authorities. The learned sessions court judge relied on the case of *Balakrishnan s/o Kuniamboo Nair v Savastine Anthony s/o Francis* [1991] 1 CLJ 503 wherein for a fracture of the femur with 4cm shortening, the court had awarded RM20,000.

[8] Before the learned judge of the High Court and before us in this appeal, Mr Brijnandan submitted that the court must accept the man as he is, that is, that he is suffering from 4cm shortening of the left leg and that the court ought to make an award on that basis. However, the learned judge found that it was not a fair submission to make and went on to state that a tortfeasor is only liable for the actual and related consequential suffering occasion to the plaintiff as a direct result of the tortfeasor's negligence. The actual shortening attributed to the subsequent accident is 2 to 2.5cm shortening and the learned judge was of the view that this is the damage that the present defendant is liable for. In this case there was evidence led that the plaintiff had already made a claim for the previous 2cm shortening through another counsel in an earlier civil suit filed. For this reason the learned judge of the High Court found that the plaintiff's request to treat this case like the egg-shell cases is totally out of line as the plaintiff cannot be allowed to enrich himself twice over the same injury.

[9] The issue that arises in this appeal, is whether the court should have considered an award based on 2.5cm or on 4.0cm shortening of the left leg. It is not disputed in this case that the plaintiff has been compensated for the first accident. It is our

considered view that the award should be on the basis of 4.0cm shortening with a slight scaling down for compensation the plaintiff received in the first accident. In this regard, we would agree with the submission of learned counsel for the plaintiff that the defendant must take his victim as he finds him. This is the egg-shell skull rule. On this point, in the case of *Watts v Rake* [1960] 108 CLR 158, Dixon CJ at p 160 had this to say:

> If the injury proves more serious in its incidents and its consequences because of the injured man's condition, that does nothing but increase the damages the defendant must pay. To sever the remaining leg of a one-legged man or put out the eye of a one-eyed man is to do afar more serious injury than it would have been had the injured man possessed two legs or two eyes. But for the seriousness of the injury the defendant must pay. 'A negligent defendant must take his victim as he finds him and pay damages accordingly. The fact that the person injured was peculiarly susceptible to ensuing complications that would not in a normal person have followed from the injuries received, or that the person injured already had a disability which made the injury the more disabling — eg the loss of an only eye — does not mean that damages are not to be assessed according to the circumstances of the particular case.

[10] In the same case, Menzies J at p 164 stated as follows:

> A negligent defendant must take his victim as he finds him and pay damages accordingly. The fact that the person injured was peculiarly susceptible to ensuing complications that would not in a normal person have followed from the injuries received, or that the person injured already had a disability which made the injury the more disabling — eg the loss of an only eye — does not mean that damages are not to be assessed according to the circumstances of the particular case.

[11] Still, on the same point in the case of *Hughes v Lord Advocate* [1963] AC 837 (HL) at p 845 Lord Reid in his speech inter alia said

> A defendant is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable.

[12] With respect to the findings of the learned judge, it would appear that his findings are clearly against the principle as set out in the above cited case authorities. His Lordship erred in not taking into consideration the effect of the present overall disability of 4cm suffered by the plaintiff. Prior to this accident, the plaintiff had a shortening of 1.5 to 2.0cm. However, this did not disable him for he kept working. The plaintiff only received crippling disabilities in the present accident. We are of the view that the learned judge of the High Court was therefore wrong when he refused to take the present disabilities including the previous injuries into consideration in deciding whether to enhance the award made by the learned trial sessions court judge.

[13] The next question to be considered is whether the award of RM28,000 for pain and suffering in the circumstances of this case is manifestly low. We find that this figure is not only manifestly low but way of the mark and out of the trend with comparable injuries. We shall proceed to show why this award of RM28,000 is manifestly low as follows:

[14] In the case of *Juminah btTongkon & Anor v Yim Kam Cheng & Anor* [1991] Mallal's Digest para 990 at p 294 for a fracture of left femur and left tibia with 3cm shortening of the leg the High Court in 1991 awarded RM40,000. There was no other disability. In the case of *Yee Yat Wah lwn Hoo Wong @ Hob See Wong dan satu lagi dan Shim Chin Tong (pihak ketiga)* [1994] CLJ 414 for fracture of the tibia with no disabilities whatsoever the High Court awarded RM10,000. For facture of the left femur with 0.5cm (1/2 cm) which affected his walk and muscle wasting, the court in 1994 awarded RM16,000. For scars, an award of RM12,000 was made.

[15] In 1966, the Federal Court in the case of *Othman bin Ahmad v Singapore Tractor Co Ltd* [1966] 1 MLJ 64 for the injuries sustained by the plaintiff, the court awarded RM20,000. This was some 38 years before our present case. In *Othman*'s case the injuries were as follows:

(1) that the plaintiff walked with a marked limp and was not able to run;

(2) that squatting was difficult;

(3) that the fractures had united but there was about ¾' to 1' of shortening in the left leg. 1 ½' of wasting in the left calf and 1 ¾' of wasting in the left thigh;

(4) that the left hip and knee was normal;

(5) that at the left ankle there was a mild equines deformity and a slight deformity in the foot;

(6) that there was marked scarring over the front of the ankle and foot;

(7) that movements at the ankle were painful and limited;

(8) that movements at the joints in the foot were markedly restricted and painful; and

(9) that there was about 80% loss in movements in these joints.

[16] The Federal Court then found the award of RM10,000 for pain and suffering and loss of amenities was too low and was so much out of line with the discernable trend or pattern of awards in reasonably comparable cases that it must be regarded as having been a wholly erroneous estimate; and that it should be increased to RM20,000.

[17] In 1966, in the case of *Mazlan bin Abu Bakar v Hob Kai Cheong* [1999] Mallal's Digest Para 1225, the court awarded RM41,000 for intertrochentric fracture

left femur, fracture of left tibia, left knee haemthrosis, 25cm scar of the left upper thigh, 1.5cm shortening and osteoarthritis of the left knee joint.

[18] In the case of *Saravanam a/l M Ramasamy v Muniyandi* [2003] 3 MLJ iv for compound fracture of the tibia and fibula with 2cm shortening a sum of RM45,000 was awarded. In the same case for laceration wound (7cm x 3cm), a sum of RM8,000 was given. On appeal by the defendant, the Shah Alam High Court dismissed the appeal and affirmed the awards of the sessions court. In*Mustapha bin Kassim & Anor v Md Akhir bin Ariffin* [2003] 3 MLJ x for fracture of tibia and fibula with 1cm shortening, the court awarded RM50,000 and for fracture of tibia left leg with 0.5cm, the court awarded RM22,000, The appeal to the High Court was struck off.

[19] In *Leong Yee Hoong v Amuthamulan a/p Shanmugam & Anor* [2003] 3 MLJ xii for compound comminuted fracture of tibia and fibula with 1cm shortening, the court awarded RM50,000. The appeal to the High Court by the defendant was dismissed and the award confirmed.

[20] We need to state in this case that nowhere in the judgment of the learned trial sessions court judge had she considered the relevant factors in support of the plaintiffs claim as follows:

(1) that the plaintiff had a bone graft operation.

(2) that apart from stiff knee he also had stiffness of the ankle.

(3) that the plaintiff will have osteoarthritis of the knee joint and with this condition the pain and stiffness in the left knee is likely to increase.

(4) that the plate that was used to fix the fracture of the femur needs to be removed. This will also entail future pain and suffering.

[21] We also noted that both the learned trial sessions court judge and the learned judge of the High Court had erred when they held the bench-mark of awards for fractures of the leg to be equated against a case of amputation, hi the case of an amputation the pain and suffering is gone. The plaintiff is able to use prosthesis to move around and is also awarded a substantial sum for prosthesis. On this point, we would refer to the case of *Azman bin Kasri v Md Isa bin Endut & Govt of Malaysia* [1988] 2 CLJ 743 wherein the award in an amputation case includes the following:

— RM12,000 for pain and suffering due to the nature of injuries to his (L) leg prior to amputation of the leg.

— RM45,000 for amputation of the leg above knee (in assessing damages, the fact that the plaintiff had refused amputation was taken into consideration).

— RM10,000 for skin grafting and resultant scar.

— RM39,740 for loss of future earnings at RM240 per month for 24 years.

— RM33,600 for cost of fitting artificial limb and for the fracture.

— RM20,640 for cost of future removal of consumptive items.

— RM10,500 for travelling expenses for servicing of artificial limb (three trips per year at RM100 per trip for 35 years).

[22] Based on the case authorities set out as above, we are of the view for the present injuries and disabilities, the plaintiff should be entitled to an award of RM45,000. However, we would make a slight reasonable deduction of RM10,000 for the previous injuries sustained by the plaintiff. We would therefore increase the award for pain and suffering to the plaintiff in this case from RM28,000 to RM35,000.

LOSS OF EARNING CAPACITY

[23] We shall now deal with the issue on the claim of loss of earning capacity. It is to be noted arising from the said accident the plaintiff had the following disabilities:

(1) he has a 4cm shortening and walks with a limping gait;

(2) there is a wasting of the muscle of his left leg with associated weakness; and

(3) there is marked stiffness of his left knee.

[24] The plaintiff is unable to squat as a result of the stiffness. All functions requiring squatting, like prayers and toilet purposes will be difficult. He will have difficulty in going up and down stairs and ladders. At the time of the accident the plaintiff was 23 years old and was working at Hicom Suzuki as an operator. He was earning about RM600 including overtime allowance.

[25] It is true as alleged by learned counsel for the defendant that the plaintiff is found to be able to cope with his injuries after the accident. In fact on his own admission, he left the factory job and took on the job as an iron monger near his home at Taiping. However, this was because at that stage of time the crippling osteoarthritis had yet to set in. Once it sets in, the plaintiff will then feel the full effects of his injury as he will have considerable pain and the stiffness will increase. The plaintiff had rightly not asked for loss of future earnings as at the date of the trial he had yet to suffer the full effect of the osteoarthritis. But there is clear medical evidence that the plaintiff will later develop osteoarthritis of the joint in which he will have to endure more pain and stiffness.

[26] The learned judge of the High Court on appeal did not allow the plaintiff's claim for loss of earning capacity wherein he was of the view that for all the disabilities the plaintiff has already been compensated for pain and suffering under the award of general damages. With respect to the learned judge's view, we find that the plaintiff is not only to be compensated for all the disabilities but also whether these disabilities will effect his earning capacity when osteoarthritis sets in and his pain and stiffness of the knee increases. Had the learned judge kept specially the deadly osteoarthritis in mind, he would have considered making the award for loss of earning capacity which the learned trial sessions court judge clearly failed.

[27] We do not dispute the learned judge's view that the plaintiff must show real or substantial risk and not merely a fanciful risk that he will lose his present employment at some time before the estimated end of his working life in order for him to raise the claim of loss of earning capacity. For the present case, it is our considered view that if the plaintiff losses his present employment it would be difficult for him with the onset of osteoarthritis to get a similar job or a job with the same salary and this is not a fanciful risk. We find that the learned judge had erred in his failure to consider this point. In the case of *Othman bin Ahmad v Singapore Tradition Co Ltd* at p 66, the Federal Court had this to say:

> Osteoarthritis seems to me to be a very important factor in this case and must be taken into consideration in assessing the future loss of earnings of the plaintiff. The plaintiff is already suffering from osteoarthritis which will get worse with time. There is a strong possibility that many years before the plaintiff reaches the retiring age (he is now only 28 years old) the pain in his left ankle and foot could be so crippling that he might not be able to work at all. The learned Judge did not appear to have given sufficient weight to this very important factor.

[28] In *Krishnan & Anor v Chow Wing Khuan* [1987] 2 MLJ 691, the Federal Court also had this to say:

> The question is whether we should award " loss of earning capacity to the respondent. Medical evidence showed that the effect of the injury to the left side of his neck resulted in weakness and wasting of muscles of his left upper limb, ie difficulty in moving the left shoulder joint and left elbow joint and not able to grip properly with his left hand. He will not be able to do any work that involves lifting heavy weights, working on scaffoldings and work that requires unrestricted use of both his upper limbs. In that condition, he might not be able to continue work as a tractor driver. However, he did work for about eight months in Sarawak and is still a tractor driver at the date of trial.
>
> It is probable that he may be able to drive the small type of tractor instead of the heavier type, e.g. bulldozer, and that would be only for a certain period of time. In the circumstances, we are satisfied that there is substantial or real risk that he will be unable to carry on his work as a tractor driver but will get a less paid employment or source of earning because of the effect of the injuries sustained. We agree therefore that he should be awarded damages for loss of earning capacity instead of loss future earnings.

[29] Based on the injuries sustained by the plaintiff and by reference to the case authorities cited above, we find that this is a fit and proper case for loss of earning capacity to be awarded to the plaintiff. We accordingly make an award of a sum of RM15,000 to the plaintiff as being fair and reasonable having regard to the nature of the plaintiffs work, the age of the plaintiff at the time of the accident and the likelihood that it would be difficult for him to get a similar job or a job with the same salary at some time before the estimated end of his working life.

[30] For the reasons above stated, we would allow the plaintiffs appeal with costs here and in the court below. In allowing this appeal, we therefore make an order increasing the award for pain and suffering to the plaintiff from RM28,000 to

RM35,000. We also make an order awarding a sum of RM15,000 for loss of earning capacity to the plaintiff. The deposit in the plaintiffs appeal is to be refunded to the plaintiff.

Appeal allowed.

Reported by Loo Lai Mee